

House File 487 - Introduced

HOUSE FILE 487
BY COMMITTEE ON JUDICIARY

(SUCCESSOR TO HSB 105)

A BILL FOR

1 An Act relating to medical malpractice claims, including expert
2 witnesses and defenses.
3 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

1 Section 1. Section 135P.1, subsection 2, Code 2017, is
2 amended to read as follows:

3 2. "*Health care provider*" means a physician or osteopathic
4 physician licensed under chapter 148, a physician assistant
5 licensed under and practicing under a supervising physician
6 pursuant to chapter 148C, a podiatrist licensed under chapter
7 149, ~~or a chiropractor~~ licensed under chapter 151, a licensed
8 practical nurse, a registered nurse, or an advanced registered
9 nurse practitioner licensed pursuant to under chapter 152 or
10 152E, a dentist licensed under chapter 153, an optometrist
11 licensed under chapter 154, a pharmacist licensed under chapter
12 155A, or any other person who is licensed, certified, or
13 otherwise authorized or permitted by the law of this state to
14 administer health care in the ordinary course of business or in
15 the practice of a profession.

16 Sec. 2. Section 147.139, Code 2017, is amended to read as
17 follows:

18 **147.139 Expert witness standards.**

19 1. If the standard of care given by a ~~physician and surgeon~~
20 ~~or an osteopathic physician and surgeon~~ licensed pursuant to
21 ~~chapter 148, or a dentist licensed pursuant to chapter 153,~~
22 health care provider is at issue, the court shall only allow
23 a person to qualify as an expert witness and to testify on
24 the issue of the appropriate standard of care if the person's
25 medical or dental qualifications relate directly to the
26 medical problem or problems at issue and the type of treatment
27 administered in the case., breach of the standard of care, or
28 proximate cause if all of the following are true:

29 a. The person is licensed to practice in the same field as
30 the defendant, is in good standing in each state of licensure,
31 and in the five years preceding the act or omission alleged to
32 be negligent, has not had a license in any state revoked or
33 suspended.

34 b. In the five years preceding the act or omission alleged
35 to be negligent, the person actively practiced in the same

1 field as the defendant or was a qualified instructor at an
2 accredited university in the same field as the defendant.

3 c. The person practiced or provided university instruction
4 in the same or substantially similar specialty as the
5 defendant.

6 d. The person is trained and experienced in the same
7 discipline or school of practice as the defendant or has
8 specialty expertise in the disease process or procedure
9 performed in the case.

10 e. If the defendant is board-certified in a specialty, the
11 person is certified in the same specialty by a board recognized
12 by the American board of medical specialties or the American
13 osteopathic association.

14 2. For purposes of this section, "health care provider"
15 means a physician or an osteopathic physician licensed under
16 chapter 148, a chiropractor licensed under chapter 151, a
17 podiatrist licensed under chapter 149, a physician assistant
18 licensed and practicing under a supervising physician under
19 chapter 148C, a licensed practical nurse, a registered nurse,
20 or an advanced registered nurse practitioner licensed under
21 chapter 152 or 152E, a dentist licensed under chapter 153, an
22 optometrist licensed under chapter 154, a pharmacist licensed
23 under chapter 155A, a hospital as defined in section 135B.1, or
24 a health care facility as defined in section 135C.1.

25 **Sec. 3. NEW SECTION. 147.140 Expert witness — certificate**
26 **of merit affidavit.**

27 1. a. In any action for personal injury or wrongful
28 death against a health care provider based upon the alleged
29 negligence in the practice of that profession or occupation or
30 in patient care, including a cause of action for which expert
31 testimony is necessary to establish a prima facie case, the
32 plaintiff shall, within ninety days of the defendant's answer,
33 serve upon the defendant a certificate of merit affidavit for
34 each expert witness listed pursuant to section 668.11 who will
35 testify with respect to the issues of standard of care, breach

1 of standard of care, or causation. All expert witnesses must
2 meet the qualifying standards of section 147.139.

3 *b.* A certificate of merit affidavit must be signed by the
4 expert witness and certify the purpose for calling the expert
5 witness by providing under the oath of the expert witness all
6 of the following:

7 (1) The expert witness's statement of familiarity with the
8 applicable standard of care.

9 (2) The expert witness's statement that the standard of care
10 was breached by the health care provider named in the petition.

11 (3) The expert witness's statement of the actions that the
12 health care provider failed to take or should have taken to
13 comply with the standard of care.

14 (4) The expert witness's statement of the manner by which
15 the breach of the standard of care was the cause of the injury
16 alleged in the petition.

17 *c.* A plaintiff shall serve a separate certificate of merit
18 affidavit on each defendant named in the petition.

19 *d.* Answers to interrogatories may serve as an expert
20 witness's certificate of merit affidavit in lieu of a
21 separately executed affidavit if the interrogatories satisfy
22 the requirements of this subsection and are signed by the
23 plaintiff's attorney and by each expert witness listed in the
24 answers to interrogatories and served upon the defendant within
25 ninety days of the defendant's answer.

26 2. An expert witness's certificate of merit affidavit does
27 not preclude additional discovery and supplementation of the
28 expert witness's opinions in accordance with the rules of civil
29 procedure.

30 3. The parties by agreement or the court for good cause
31 shown and in response to a motion filed prior to the expiration
32 of the time limits specified in subsection 1 may provide for
33 extensions of the time limits. Good cause shall include
34 but not be limited to the inability to timely obtain the
35 plaintiff's medical records from health care providers when

1 requested prior to filing the petition.

2 4. If the plaintiff is acting pro se, the plaintiff
3 shall sign the certificate of merit affidavit or answers to
4 interrogatories referred to in this section and shall be bound
5 by those provisions as if represented by an attorney.

6 5. a. Failure to substantially comply with subsection
7 1 shall result, upon motion, in dismissal with prejudice of
8 each cause of action as to which expert witness testimony is
9 necessary to establish a prima facie case.

10 b. A written notice of deficiency may be served upon the
11 plaintiff for failure to comply with subsection 1 because of
12 deficiencies in the certificate of merit affidavit or answers
13 to interrogatories. The notice shall state with particularity
14 each deficiency of the affidavit or answers to interrogatories.
15 The plaintiff shall have twenty days to cure the deficiency.
16 Failure to comply within the twenty days shall result, upon
17 motion, in mandatory dismissal with prejudice of each action
18 as to which expert witness testimony is necessary to establish
19 a prima facie case. A party resisting a motion for mandatory
20 dismissal pursuant to this section shall have the right to
21 request a hearing on the motion.

22 6. For purposes of this section, "*health care provider*"
23 means the same as defined in section 147.139.

24 Sec. 4. NEW SECTION. 622.31A Evidence-based medical
25 practice guidelines — affirmative defense.

26 1. For purposes of this section:

27 a. "*Evidence-based medical practice guidelines*" means
28 voluntary medical practice parameters or protocols established
29 and released through a recognized physician consensus-building
30 organization approved by the United States department of
31 health and human services, the American medical association's
32 physician consortium for performance improvement or similar
33 activity, or a recognized national medical specialty society.

34 b. "*Health care provider*" means the same as defined in
35 section 147.139.

1 ADVERSE HEALTH CARE INCIDENTS. Under Code chapter 135P, if
2 an adverse health care incident occurs, a health care provider
3 may offer to engage in an open discussion with the patient. If
4 the patient agrees, the health care provider may investigate
5 the incident, disclose the results to the patient, and discuss
6 steps the health care provider will take to prevent similar
7 incidents. The health care provider may also communicate to
8 the patient whether the health care provider believes that
9 an offer of compensation is warranted. All communications
10 made related to the open discussion are privileged and
11 confidential, are not subject to discovery or subpoena, and
12 are not admissible in evidence in a judicial, administrative,
13 or arbitration proceeding. Under current Code chapter 135P,
14 "health care provider" is defined as a physician licensed under
15 Code chapter 148, a physician assistant licensed under Code
16 chapter 148C, a podiatrist licensed under Code chapter 149, or
17 an advanced registered nurse practitioner licensed pursuant
18 to Code chapter 152 or 152E. The bill redefines "health
19 care provider" to mean a physician or osteopathic physician
20 licensed under chapter 148, a physician assistant licensed and
21 practicing under a supervising physician pursuant to chapter
22 148C, a podiatrist licensed under chapter 149, a chiropractor
23 licensed under chapter 151, a licensed practical nurse, a
24 registered nurse, or an advanced registered nurse practitioner
25 licensed under chapter 152 or 152E, a dentist licensed under
26 chapter 153, an optometrist licensed under chapter 154, a
27 pharmacist licensed under chapter 155A, or any other person who
28 is licensed, certified, or otherwise authorized or permitted by
29 the law of this state to administer health care in the ordinary
30 course of business or in the practice of a profession.

31 EXPERT WITNESSES IN MEDICAL MALPRACTICE CASES. The
32 bill provides standards for an expert witness in a medical
33 malpractice case. The bill provides that a person is
34 only qualified to serve as an expert witness in a medical
35 malpractice case if the person is a licensed health care

1 provider, is in good standing in each state of licensure, and
2 in the five years preceding the act or omission alleged to
3 be negligent, has not had a license in any state revoked or
4 suspended; in the five years preceding the act or omission
5 alleged to be negligent, actively practiced in the same field
6 as the defendant or was a qualified instructor at an accredited
7 university in the same field as the defendant; practiced or
8 provided instruction in the same or substantially similar
9 specialty as the defendant; is trained and experienced in the
10 same discipline or school of practice as the defendant or
11 has specialty expertise in the disease process or procedure
12 performed in the case; and, if the defendant is board-certified
13 in a specialty, the person is certified in the same specialty.

14 The bill establishes a requirement for a certificate of
15 merit affidavit for expert witnesses in medical malpractice
16 cases. In an action for personal injury or wrongful death
17 against a health care provider based upon alleged negligence
18 in the practice of that profession or in patient care, the
19 bill requires the plaintiff, within 90 days of the defendant's
20 answer, to serve upon the defendant a certificate of merit
21 affidavit for each expert witness who will testify with respect
22 to the issues of standard of care, breach of standard of care,
23 or causation. A certificate of merit affidavit must be signed
24 by the expert witness and certify the purpose for calling
25 the expert witness by providing under the oath of the expert
26 witness the expert witness's statement of familiarity with the
27 applicable standard of care; statement that the standard of
28 care was breached by the health care provider; statement of the
29 actions that the health care provider failed to take or should
30 have taken; and statement of the manner by which the breach of
31 the standard of care was the cause of the injury.

32 The bill provides that answers to interrogatories may
33 serve as an expert witness's certificate of merit affidavit
34 if the interrogatories satisfy the requirements of the bill.
35 The bill provides that the expert witness's certificate of

1 merit affidavit does not preclude additional discovery and
2 supplementation of the expert witness's opinions.

3 The bill provides that failure to substantially comply with
4 the new requirements shall result, upon motion, in dismissal
5 with prejudice of each cause of action as to which expert
6 witness testimony is necessary to establish a prima facie
7 case. A written notice of deficiency may be served upon the
8 plaintiff for failure to comply with the bill requirements
9 because of deficiencies in the certificate of merit affidavit
10 or answers to interrogatories, and the plaintiff shall have 20
11 days to cure the deficiency. Failure to comply within the 20
12 days shall result, upon motion, in mandatory dismissal with
13 prejudice of each action as to which expert witness testimony
14 is necessary to establish a prima facie case.

15 EVIDENCE-BASED MEDICAL PRACTICE GUIDELINES. The bill
16 defines "evidence-based medical practice guidelines" as
17 voluntary medical practice parameters or protocols established
18 and released through a recognized physician consensus-building
19 organization.

20 The bill provides that in any action for personal injury
21 or wrongful death against a health care provider based
22 upon the alleged negligence of the health care provider in
23 patient care, the health care provider may establish as an
24 affirmative defense that the health care provider complied with
25 evidence-based medical practice guidelines in the diagnosis and
26 treatment of the patient.

27 The bill provides that the court shall admit evidence-based
28 medical practice guidelines into evidence if introduced by a
29 health care provider or the health care provider's employer
30 and if the health care provider or the health care provider's
31 employer submits evidence that the evidence-based medical
32 practice guideline was appropriate for the patient and that
33 the health care provider complied with such evidence-based
34 medical practice guidelines. Evidence of departure from a
35 guideline is admissible only on the issue of whether the health

1 care provider is entitled to establish an affirmative defense
2 under the bill. There shall be no presumption of negligence
3 if a health care provider did not adhere to an evidence-based
4 medical practice guideline.